SUPREME COURT OF INDIA

Kumar Gonsusab

Vs.

Sri Mohammed Miyan Urf Baban

C.A.No.157 of 2001

(Tarun Chatterjee and P.Sathasivam JJ.)

19.08.2008

JUDGMENT

Tarun Chatterjee, J.

1. This appeal is directed against the judgment and decree dated 5th of November, 1998 passed by the High Court of Karnataka at Banglore in R.S.A. No. 831/1996, by which the second appeal filed by the respondents was allowed and judgment and decree of the courts below were set aside and the suit was decreed with costs.

2. The moot question that was raised by the parties before the courts below as well as before the High Court was - whether the law of pre-emption based on vicinage is void as held by this Court in the case of *Bhau Ram vs. B. Baijnath Singh*[1] *and Sant Ram & Ors. vs. Labh Singh & Ors.*[2]. However, while setting aside the judgments of the courts below, the High Court in second appeal held that the law of pre-emption on the ground of vicinage could not be held to be void and unconstitutional in view of the amendment of the Constitution.

3. Mohd. Ismail Urf Badshah-Plaintiff No.1 (since deceased) and Mohammed Miyan Urf Baban- Plaintiff No.2 instituted a suit for permanent injunction against Smt. Hamedabegum (Defendant No. 1/Appellant No.3) wife of Mohd Yusuf Maniyar and against Kumar Gonsusab (Defendant No. 2/Appellant No.1) and Kumar Shafi Mohd (Defendant No. 3/Appellant No.2) restraining the appellants from executing a sale deed relating to the suit property on the ground of right of pre-emption, to purchase 6 acres 31 guntas being R.S.No.164/3B situated at Mishrikoti village of Kalghatagi taluk, Dharwad in the State of Karnataka (hereinafter referred to as the `suit property') and for other incidental reliefs. Be it mentioned at this stage, that the original Plaintiff No.1, namely, Mohd. Ismail Urf Badshah died during the pendency of the proceeding and his heirs and legal representatives were brought on record. In this judgment, the plaintiffs are described as respondents and the defendants are described as appellants.

4. The case that was made out by the respondents may be summarized as follows:- The suit property was the ancestral property belonging to the family of the respondents, which was sub-divided among the co-sharers. Smt. Hamedabegum, Appellant No. 3 was born in the family of the respondents and she was given in marriage. The respondents were adjoining owners of the suit property and they were entitled to pre-empt the suit property on the ground of vicinage. The Appellant No.3 had entered into a mere agreement to sell the suit property to Appellant Nos. 1 and 2 by a registered agreement for sale executed on 12th of February, 1987. The respondents claimed pre- emption on the ground of vicinage under the Mohammedan Law and family customs in respect of the suit property. Since on 19th of February, 1987, the appellants attempted to mutate their names on the basis of the aforesaid registered agreement to sell, executed on 12th of February, 1987, the respondents, after coming to know the intention of the appellants to sell the suit property on the basis of the registered agreement to sell, expressed their intention to exercise right of pre-emption on the ground of vicinage. Since the Appellant No.3 had refused to sell the suit property to the respondents, they were constrained to file the suit for permanent injunction, restraining the Appellant No.3 from executing the sale deed in favour of Appellant Nos. 1 and 2 claiming pre-emption on the ground of vicinage.

5. After entering appearance, the Appellant Nos. 1 to 3 had filed a written statement, denying the material allegations made in the plaint. They, however, admitted that the respondents were the owners of the adjacent land of the suit property and the fact of entering into an agreement to sell by Hamedabegum, Appellant No.3 in favour of Appellant Nos. 1&2 was admitted. It was alleged in the written statement that since Appellant No.3 was the owner of the suit property and had every right to sell the same to the person she would have liked, the suit for permanent injunction against the appellants must be dismissed.

6. The following issues were framed by the trial court:

> " i). Whether plaintiffs prove that they have right of pre-emption over the intended sale deed executed by defendant no.1 in favour of defendant nos. 2 and 3?
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> ii). Is the plaintiff entitled to pre-emption as against all the defendants?
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> iii). Whether defendant nos. 1 and 3 are entitled for compensatory costs of Rs.3000/- each?
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> iv). Whether defendants proves that law of pre- emption is not applicable to State of Karnataka and more so to agricultural land?
>
> (v) Whether court fee paid is proper?
>
> (vi) What order? What decree? "

7. The trial court after framing the issues and after permitting the parties to adduce evidence and considering them and also the materials on record and the law as laid down in Bhau Ram

vs. B. Baij Nath Singh (supra) and Sant Ram vs. Labh Singh (supra), dismissed the suit inter alia holding that the law of pre-emption on the ground of vicinage was unconstitutional and void. The trial Court further held that the question of right of pre-emption of the respondents in respect of the suit property could not arise in view of the fact that the agreement for sale could not create any interest in the suit property in favour of Appellant Nos.1&2 and for this purpose, reliance was placed by the trial Court on Section 232 of the Mohammedan Law. An appeal was carried by the respondents before the first appellate court and the first appellate court after considering the judgment and decree of the trial court and also after re-appreciating the evidence on record dismissed the appeal by its judgment dated 6th of March, 1996. Against the judgment of affirmance of the courts below, a second appeal was filed by the respondents which, by the impugned judgment, allowed the second appeal, holding that in the light of the amendment to the Constitution, the law of pre- emption on the ground of vicinage cannot be held to be unconstitutional and void. However, the High Court had failed to deal with the question which was decided by the trial court as well as the appellate court to the effect whether the suit for pre-emption brought on the basis of such an agreement was without any cause of action as there was no right to pre-emption in the respondents which could be enforced under the law in view of Section 232 of the Mohammedan Law. It was further held by the High Court, while setting aside the judgments of the courts below, that the respondents had got right of pre- emption, if the agreement for sale was going to be given effect to by the appellants and if not then certainly the respondents were not affected and that if the agreement for sale was going to result in a sale deed then such sale must be held to be in violation of the above provision. With these findings, both the judgments and decrees of the courts below were set aside and the suit was decreed. It may be reiterated that the High Court, while setting aside the judgment of the courts below, held that the law of pre-emption based on vicinage cannot be held to be void and unconstitutional in view of the amendment of the Constitution.

8. Keeping the aforesaid conclusions arrived at by the High Court in mind, we now proceed to deal with the questions raised before us. So far as the constitutionality of the right of pre-emption on the ground of vicinage is concerned, we find that the High Court, as noted hereinearlier, held that the right of preemption on the ground of vicinage under the Mohammedan Law cannot be said to be unconstitutional and void in view of the amendment to the Constitution. Whereas the Courts below relying on the two decisions, namely Bhau Ram's case (supra) and Sant Ram's case (Supra), held that the right of preemption on the ground of vicinage was unconstitutional and void. It is true that subsequent to the aforesaid two decisions, this Court again reiterated the principles as laid down in Bhau Ram's case (supra) and Sant Ram's case (Supra) in the case of *Atam Prakash vs. State of Haryana & Ors.*[3] and also in *A.Razzaque Sajansaheb Bagwan & Ors. vs. Ibrahim Haji Mohammed Husain*[4]. We, however, do not intend to go into this question in this case as in view of our decision on the other issue, namely, whether the suit for preemption on the ground of vicinage was maintainable in law in view of the admitted fact that only an agreement for sale of the suit property was entered into by the appellant No. 3 with the Appellant Nos. 1 & 2.

9. Let us now take up the other question that was raised by the learned counsel for the parties. In our view, as indicated herein earlier, the issue whether the suit for pre-emption on the ground of vicinage could be entertain able when only a mere agreement for sale has been entered into by the appellant No.1 in favour of the appellant Nos. 2 and 3 in respect of the suit property. In our view, on this account, the judgment and decree of the High Court cannot be sustained.

10. Admittedly, a registered agreement for sale was entered into by the appellant No.1 with the appellant Nos. 2 and 3. Before we proceed further, we may refer to Chapter XIII of the Mohammedan Law, (Ed.19 by Mulla). Chapter XIII deals with pre- emption under the Mohammedan Law. Section 226 says that right of pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immoveable property which has been sold to another person. Section 232 of the Mohammedan Law would also be relevant which runs as under:

> "232. Sale alone gives rise to pre-emption - The right of pre-emption arises only out of a valid (a), complete (b), and bonafide (c) sale. It does not arise out of gift (hiba), sadaquah (s.171), wakf, inheritance, bequest (d), or a lease even though in perpetuity (e), Nor does it arise out of a mortgage even though it may be by way of conditional sale (f); but the right will accrue, if the mortgage is foreclosed (g). An exchange of properties between two persons subject to an option to either of them to cancel the exchange and take back his property at any time during his life, stands on the same footing as a conditional sale; such an exchange does not extinguish the ownership in the property and does not give rise to the right of pre-emption. But if one of the parties dies without canceling the exchange, the transaction will mature into two sales and will give rise to the right of preemption (h). It has been held by the High Court of Allahabad that a transfer of property by a husband to his wife in lieu of dower is a sale, and is therefore subject to a claim for pre-emption (i). On the other hand, the Chief Court of Oudh has held that the transaction amounts to a hiba-bil-ewaz, and no claim for pre-emption can therefore arise (j).
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> On a plain reading of Sections 226 and 232 of the Mohammedan Law, it is clearly evident that the right of pre-emption can only accrue to an owner of immoveable property when another immoveable property is sold to another person. Section 232 of the Mohammedan Law also indicates that sale alone gives rise to pre-emption. Such being the provision made in Sections 226 and 232 and in view of the admitted fact that in this case admittedly sale was not affected by appellant No.1 in favour of the appellant Nos. 2 and 3 in respect of the suit property, we are not in a position to hold that the suit for pre-emption was maintainable as there was no cause of action to file such suit in the absence of a sale deed effected in respect of the said agreement for sale."

11. In this connection, Section 54 of the Transfer of Property Act may also be referred to. Section 54 of the Transfer of Property Act says that a contract for sale does not, of itself, create any interest in or charge on immoveable property. Therefore, where the parties enter

into a mere agreement to sell, it creates no interest in the suit property in favour of the vendee and the proprietary title does not validly pass from the vendors to the vendee and until that is completed no right to enforce pre-emption arises. Therefore, in our view, the suit for pre- emption brought on the basis of such an agreement was without any cause of action as there was no right of pre-emption in the respondents which could be enforced under the law. In *Radhakishan Laxminarayan Toshniwal, Vs. Shridhar Ramchandra Alshi &Ors.*[5], this Court has held that the transfer of property, where the Transfer of Property Act applies, has to be under the provisions of the Act only and Mohammedan Law or any other personal lawof transfer of property cannot override the statute. Therefore, unless title to the suit property has passed in accordance with the Act, no right to enforce pre-emption arises. In view of our discussions made hereinabove, we are, therefore, of the view that in view of the admitted fact that merely agreement for sale was entered into by the appellant No.3 with the appellant Nos.1 and 2 in respect of the suit property, the question of exercising any right of pre-emption in the respondents could not arise at all, as already observed, a suit for pre-emption brought on the basis of such an agreement for sale must be held to be without any cause of action as there was no right of pre-emption in the respondents which could be enforced under the law. We should not be unmindful of the fact that there are no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute. It is well settled that it would be open to the pre- emptee, to defeat the law of pre-emption by any legitimate means, which is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means.

12. That apart, it is now well settled that the right of pre-emption is a weak right and is not looked upon with favour by courts and therefore the courts cannot go out of their way to help the pre-emptor. (See: *Radhakishan Laxminarayan Toshniwal vs. Shridhar Ramchandra Alshi & Ors.*[6]).

13. Such being the position, we are, therefore, of the view that the right of pre-emption was not available to the respondents in view of the discussions made herein above.

14. For the reasons aforesaid, this appeal is allowed and the judgment and decree of the High Court in the second appeal is set aside and consequent thereupon the suit of the respondents is dismissed. There will be no order as to costs.

15. We make it clear that if ultimately the sale deed is executed, it would be open for the respondents to apply for pre-emption of the suit property, if under the law they are permitted to maintain the suit for pre-emption.

[1]1962 Supp.3 SCC 724 *[2]1964 (7) SCR 756* *[3](1986) 2 SCC 249* *[4](1998) 8 SCC 83*
[5]AIR 1960 SC 1368 *[6]AIR 1960 SC 1368*